TWENTY YEARS OF THE NLRB: UNIT AND CONTRACT BAR PROBLEMS IN REPRESENTATION CASES

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INTRODUCTION

The two decades since the Wagner Act became law on July 5, 1935 have seen momentous changes in the internal structure of the American economy, brought about by an increase in trade union membership from approximately three million in 1935 to over 15,000,000 at the present time. Economists have discussed the changed status of the American worker; politicians and political scientists have been concerned with the new leverage, or lack of it, of a greatly expanded labor movement; management has been compelled to make far-reaching adjustments in its way of doing business; and labor has found itself faced with novel responsibilities and complex new issues. This article attempts to deal only with a small facet of that history; the role played by the National Labor Relations Board in deciding unit and contract bar issues in representation cases. In those twenty years, about 12,000,000 persons have voted in 78,614 elections conducted by the NLRB. The decided cases dealing with these issues are so numerous that it is possible to sketch only the highlights.

Section 9 of the Wagner Act provided the legal structure for the holding of industrial elections by the Government. The charter given the NLRB was extremely broad; the only statutory requirement was that the Board have "reasonable cause to believe that a question of representation affecting commerce exists". Section 9 (b) of the Act authorized the Board to find appropriate "an employer unit, craft unit, plant unit or subdivision thereof" thereby granting the Board an almost unlimited discretion in finding appropriate units. It was entirely silent on the question whether and under what circumstances an existing collective agreement should operate to bar the holding of an election.

The Wagner Act sought to achieve different, and sometimes irreconcilable, goals. The preamble of the Act spoke of the "stabilization of wage rates and working conditions" in order to minimize strikes and depressions. It called on the Board to encourage "the practice and procedure of collective bargaining". It sought to guarantee "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing". Often these goals are not inconsistent; frequently they are. Holding an election in the face of an existing collective agreement achieves the statutory goal of "full freedom" for workers, but can hardly be said to "stabilize" working conditions, and it may be doubted whether it "encourages" collective

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bargaining. The Board can recognize the "full freedom" of a group of employees who do not desire collective bargaining by excluding them from an appropriate unit, though it thereby discourages the practice of collective bargaining. The unauthorized strike vividly demonstrates the full freedom of workers, but can hardly be said to aid the practice of collective bargaining or the achievement of stabilized wage rates and working conditions. It is the thesis of this survey that the Board initially stressed the concept of "full freedom" in dealing with these problems and that the intervening two decades have been marked by an increasing emphasis on stabilization of labor relations.

THE INFLUENCE OF PREDECESSOR BOARDS ON THE NLRB

The immediate historical background profoundly influenced the early decisions of the NLRB. There was, first, the experience of the National Mediation Board under the Railway Labor Act.

That Act[1] had provided machinery for the conduct of elections on the railroad systems of the country. Its constitutionality had been sustained in *Texas and New Orleans R.R. v. Brotherhood of Clerks*[2]. The rest of the labor movement regarded with a certain envy the protections and services accorded railway workers. The Act on the whole had worked well, due in no small part to the fact that it had had the support of both railway management and labor at the time of its passage. The jurisdictional lines of the railroad brotherhoods were sufficiently clear so that the Board had been required only rarely, and then only in the case of minor fringe groups, to decide issues of the appropriate "craft or class" under the Act.

There was, secondly, the experience of the Automobile Labor Board, appointed under the National Industrial Recovery Act on March 24, 1934, to settle a threatened strike in the industry, with Professor Leo Wolman as Chairman. Section 7 (a) of the NRA did not specify "majority rule"; i.e., the right of the majority union in an appropriate unit to speak for all employees. The Automobile Labor Board adopted a rule of proportional representation. Employees voted for individual representatives, and could "specify" to which group the representative should belong. The Board noted in its report of February 5, 1935 that,

> The total of such specifications throughout the plant for each of such groups will determine the proportion which each of such groups will have on the bargaining agency . . . .

The Board thereby proposed to set up organizations more like German works councils than traditional American trade unions. The Board also held elections on its own motion (rather than when requested by unions), thus adopting the pattern of political elections. The results, from a trade union point of view, were disastrous; of over 53,000 votes cast in the industry, nearly 41,000 were "unaffiliated" and the American

[1] 44 Stat. 577, 45 U. S. C. §152 (1926).

[2] 281 U. S. 548 (1930).

Federation of Labor received only slightly more than 2,000 votes. The Board never resolved the most obvious question; namely, how were "unaffiliated" voters to select a representative to bargain for them? And the manner of timing elections made impossible the organizational and propaganda drive necessary for trade union success, particularly in circumstances where an elaborate system of industrial espionage and discriminatory discharges made such work difficult and often physically dangerous. The hostility of labor to the policies of the Board was sufficiently vigorous to secure statutory recognition in the Wagner Act of two important doctrines: majority rule and the holding of elections only upon the request of unions.

Third, the new NLRB inherited the personnel, and hence many of the traditions, of the old National Labor Relations Board which had been appointed by President Roosevelt pursuant to Public Resolution No. 44[3] of June 29, 1934, under the Chairmanship of Dean Lloyd Garrison and, subsequently, Francis Biddle. In adopting the Wagner Act, the Congress had drawn extensively on its experience and had given statutory approval of its principal doctrines. In general, that Board had made the probable success or failure of a *bona fide* union the key to directing elections. Denials of elections rested on such grounds as "There is no evidence that a substantial number of the employees desire an election . . ."[4] that "The union undeniably represents . . . a majority of the employees . . . The Company should recognize the union"[5] that "the company is still preculiarly anxious that an election be conducted. . . . Our suspicion that this anxiety on the part of the company is directed less towards helping its employees to achieve true collective bargaining status than it is in thwarting the efforts made by the Brotherhood"[6]. The bargaining unit was frequently defined as "production workers"[7] or "that group of employees eligible for membership in" the union.[8]

The decisions of the old NLRB contain few examples of conflicts between legitimate unions concerning appropriate bargaining units. In most cases, the formula of "production and maintenance" workers sufficed, for the thrust of the new organizing effort was principally in industrial plants. But in the course of its decisions it formulated a series of criteria which it considered relevant to a determination of the problem of the appropriate unit; the community of interest of the employees, eligibility for membership in the union seeking the election, their functional coherence, geographical proximity, and the history of bargaining relationships[9], which have been largely relied on by all their successors.

[3] H. R. Res., 375, 73d Cong. 2d Sess. (1934).
[4] Ward Baking Co., II N.L.R.B. (old) 47, 50 (1934).
[5] Carson Pirie Scott, II N.L.R.B. (old) 506 (1935).
[6] John E. Lucey Shoe Co., II N.L.R.B. (old) 251, 255 (1935).
[7] American Oak Leather, II N.L.R.B. (old) 82 (1935).
[8] Acme Machine Products Co., II N.L.R.B. (old) 71 (1934).
[9] Index, II N.L.R.B. (old) 555 (1935).

While the old National Labor Relations Board decided these issues, its opinions were largely academic. Public Resolution No. 44 provided judicial review of election orders in the circuit courts of appeals; delays were such that Chairman Biddle in testifying before the Senate Labor Committee on the Wagner Act in March, 1935,[10] stated that,

> In every case where the employers have not consented to the holding of the election . . . the employer has succeeded in tying up the enforcement of the order.

The current decisions of the Supreme Court had encouraged a widespread belief that the Wagner Act would be held unconstitutional. The decision in *Schechter Poultry Company v. U. S.*,[11] holding the National Industrial Recovery Act unconstitutional, had eliminated the statutory authority of the old NLRB and placed the new Board under an ominous cloud. For nearly the first two years of its life, the Board operated without effective enforcement powers and hence without real authority.

At least one other factor impinging on the early work of the NLRB warrants mention: The tradition of "voluntarism" in the American Labor movement. Professor John R. Commons of the University of Wisconsin had been its principal exponent; he had elaborated his views with explicitness in stating his minority views as a member of the Commission on Industrial Relations in 1916.[12]

The opinion that it was unwise to introduce the Government into problems of organization and collective bargaining, while subdued in 1935, had not been extinguished. It was recognized that the power to decide the "appropriate unit" carried with it the power to shape the future growth of the labor movement. Yet it was obvious that these matters had to be decided if elections were to be held. The comparative

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[10] *Hearings Before the Senate Labor Committee,* 73rd CONG., 2d SESS. 97 (1935).

[11] 295 U. S. 495 (1935).

[12] Final Report of Commission on Industrial Relations, Report of Commissioners Commons and Harriman, vol. 1. p. 212 where he had observed,

> If the State recognized any particular union by requiring the employer to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses that it may practice. The State might be compelled to regulate its initiation fees and dues, its apprenticeship ratio, its violation of agreements, and all of the other abuses on account of which the employer refuses to deal with it . . . there is no place where the State can stop if it brings compulsion to bear on the employers without also regulating by compulsion the unions . . . two opposing organizations, equally strong, are able to drive out abuses practiced by the other.
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> Some portion at least of this prophetic utterance has been confirmed by the Taft-Hartley Act of 1947. Section 8(b) (5) forbade unions to charge "excessive or discriminatory" dues; section 301 granted new remedies, and perhaps new substantive rights, for union breaches of agreements, and section 8(d) was added to impose new obligations with respect to the modification or termination of agreements.

ease with which these questions had been decided by the old NLRB and the Mediation Board quieted many doubts. The forces that were to lead to the split in the labor movement following the suspension of the Committee for Industrial Organization were but dimly perceived. The attitude of labor at the time of the passage of the Act was summed up in testimony given by Judge Joseph Padway, then General Council of the AF of L, in 1939,[13]

> . . . in providing legislation (the Wagner Act) . . . labor did not think it was surrendering its philosophy of 'voluntarism', its right to regulate and conduct its own internal affairs, and to maintain and change its form and structure as it deemed wise and proper without governmental intervention,

and

> The National Labor Relations Act was devised to deal with conflicts between employers and labor. It was not devised to deal with conflicts between national organizations.

Initial NLRB Views

Thus the factors impinging on the new NLRB all counselled generosity in the directing of elections. There was, first, the sense of frustration felt by the Board and the labor movement in the inability of the old and the new NLRB to make election orders effective, coupled with the harrassment of a spate of injunctions and unresolved constitutional doubts. It was thus not surprising that the NLRB seized such opportunities as were presented to hold elections. There was, second, an accelerating interest and activity in the organization of unions and a favorable political climate; the direction and holding of an election showed Government interest in, and to a degree sympathy for, those trends. Initially, at least, there was not that division within the labor movement that later made many decisions appear partisan to the AF of L or the CIO.

Conforming to the tradition of "voluntarism", the Board early adopted a policy of not being drawn into inter-union conflicts in a conscious effort to leave their solution to the voluntary machinery of the American Federation of Labor. In *Aluminum Company of America*,[14] the Board said in such a case that

> Such a question, involving solely and in a peculiar fashion the internal affairs of the American Federation of Labor and its chartered bodies can best be decided by the parties themselves.

The same rule was applied in *Axton-Fisher Tobacco Company*.[15] There the Tobacco Workers Union and the Machinists Union both claimed jurisdiction over machine fixers. Both Unions were affiliates of the

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[13] *Hearings Before the House Committee on Education and Labor* 76th Cong., 1st Sess. 822 (1939).

[14] 1 N.L.R.B. 530 (1936).

[15] 1 N.L.R.B. 604 (1936).

AF of L. In refusing to decide the despute, the Board noted that "jurisdictional disputes" had long existed, and observed,

> While the Act provides a new vocabulary in which such jurisdictional disputes may be described, it does not alter their nature. . . . Obviously a craftsman will join the Union to which other members of his craft belong and which is recognized by American Federation of Labor as having jurisdiction over that craft . . . the issue remains as simply a jurisdictional dispute between two unions. . . .

The Board rested its hands-off policy on the ground that

> It is preferable that in the light of the declared policy of Congress—'the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing'—the Board should leave organizations of labor free to work out their own solutions through the procedure they themselves have established for that purpose.

But the policy was short-lived. On September 5, 1936, the Convention of the AF of L suspended the unions affiliated with the Committee for Industrial Organization. The Board was thereupon constrained to hold, in *Interlake Iron Corporation*[16] that though two competing unions both retained a technical affiliation with the AF of L, "we would be blind, indeed, to facts of common knowledge if we therefore concluded that both unions would submit to the authority of that body". It therefore refused to dismiss the case on the ground that a "jurisdictional dispute" was involved and directed an election. Where two or more unions were affiliated with the same parent body, the Board continued to follow the rule of the *Axton-Fisher* case[17] except in cases where a third organization, unaffiliated with the same parent body, also sought to represent employees.[18]

In these cases, the Board for the first time wrestled with some semantic problems. In the *Axton-Fisher* case, for example, the question whether machine fixers should or should not be included with machinists or production workers presents a rather typical question of the "appropriate unit". To the organizations involved, and to the Board, it was a "jurisdictional dispute" since both unions asserted that the AF of L had assigned them "jurisdiction" over these workers. In a slightly different context—if the Machinists, for example, insisted that their members do machine fixing—it would appear to be a dispute over "assignment of work". The Board noted that a "new vocabulary" was involved, but insisted that the essential nature of the dispute had not changed. These problems assumed a new importance after the passage of the Taft-Hartley Act in 1947.[19]

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[16] 2 N.L.R.B. 1036 (1937).

[17] Curtis Bay Towing, 4 N.L.R.B. 360 (1937); Weyerhauser Timber Co., 16 N.L.R.B. 902 (1939).

[18] Long Bell Lumber Co., 16 N.L.R.B. 892 (1939).

[19] infra, pp. 368-69.

THE EMERGING CRAFT—INDUSTRIAL UNIT PROBLEM

The new NLRB, building on the work of its predecessor, began to refine the considerations to be relied on in determining appropriate bargaining units. In its Second Annual Report,[20] it set forth at length the factors which had influenced its decisions: the history of labor relations in the industry, and in the particular enterprise; the present form of self-organization; the eligibility of employees to membership in labor organizations involved in the dispute; and the mutual interest of employees, including such factors as the nature of the work performed, the degree of skill required, the wages paid, the degree of supervisory status enjoyed, the permanence or casualness of their work, their functional coherence and their geographic proximity. While the question of the appropriate unit raised many problems, by all odds the most dramatic was the issue between "craft" and "industrial" unionism. These not-too-accurate terms purported to draw the line between AF of L, or traditional, trade unionism, and CIO, or mass, trade unionism. *Interlake Iron* had set the stage for drawing the Board into the conflict, and thereafter this single issue gave the Board more difficulty than any other.

Within a year, the Board had added another criterion which it emphasized: The "desire of employees as to inclusion in the appropriate unit."[21] The new language was the result of the decision in *Globe Machine and Stamping Co.*[22] In that case the Board announced that "where the considerations (between craft and industrial unionism) are so evenly balanced, the determining factor is the desire of the men themselves" and directed that craft workers be separately polled; if they voted for the craft union, the Board would find that unit appropriate, and if for the industrial union, would find an over-all unit.

Though this rationale was couched in terms of "the desire of the men themselves", it clearly met the desires of craft unionists; indeed, in 1939 when the AF of L proposed amendments to the Act, its proposal on this issue was to write the *Globe* doctrine into the Act. It would seem entirely clear, also, that Judge J. Warren Madden, the Chairman of the Board and the chief proponent of the *Globe* doctrine, was emphasizing the "freedom of association" concept of the statute. "Desires of the men themselves" is an obviously elusive phrase until the question "What men?" is answered; doubtless many rank-and-file workers desired to associate the superior economic strength of the skilled workers with their cause. And the craftsmen might justifiably fear a dilution of that same bargaining strength, on the grounds pointed out by one commentator,[23]

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[20] 2 N.L.R.B. Ann. Rep. 125-40 (1937).

[21] 3 N.L.R.B. Ann. Rep. 167 (1938).

[22] 3 N.L.R.B. 294 (1937).

[23] Summer Schlichter, The Present Status of Industrial Relations, Speech Before the Associated Industries of Cleveland, March 12, 1954, 33 LRRM 36, 43.

> The craftsmen have learned that the industrial unions frequently do not give them very adequate representation. Many industrial unions have bargained for cents-per-hour wage increases rather than percentage wage increases. Thus, the differential between the semi-skilled workers and skilled craftsmen has been substantially reduced. Now the craftsmen are . . . endeavoring to sever themselves from industrial unions.

Board Member Edwin Smith, who had concurred in the *Globe* decision, shortly began to emphasize statutory objectives other than "freedom of association". He formulated his views in *Allis-Chalmers Manufacturing Co.*[24] where he dissented from a decision applying the *Globe* doctrine because,

> Permitting minorities to set themselves off, as all the indications are they would do in this instance, succeeds in providing full self-determination for the minority but only at the expense of disregarding the interests of the majority.
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> The statute states that the Board shall decide in each case the appropriate bargaining unit in order to insure to employees the full benefit of their right to self-organization and to collective bargaining . . . the policies of the Act are clearly aimed at establishing that form of collective bargaining which will be most likely to lead to industrial stability and peace . . . If (the crafts) bargain separately, by so much is the united economic strength of the employees as a whole weakened.

If the "united economic strength" would be "weakened", it is fair to inquire whether this would be at the expense of the employer, the craftsmen, or both? "Effective collective bargaining" rather than "freedom of association", in any event, was here emphasized as the statutory goal.

A third element was introduced with the appointment of Dr. William Leiserson to the Board in 1939. In *Milton-Bradley Co.*,[25] he gave it as his view that "Congress intended to adopt the designation 'bargaining unit' as determined by the working agreements voluntarily made by the employees with their employers" and asserted that "only by considering itself bound by the bargaining units established and maintained by collective bargaining contracts can an administrative board keep itself from taking sides in jurisdictional controversies among labor organizations which differ as to the most effective form of organization for collective bargaining purposes". Chairman Madden insisted that this rule made it "in practical effect impossible, after a contract has once been made with an industrial union, for craft groups of employees ever to obtain craft units . . . ."

As might be expected, Board Member Smith concurred in the denial of craft severance involved in the *Milton-Bradley* rule. That

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[24] 4 N.L.R.B. 159 (1937).

[25] 15 N.L.R.B. 938 (1939).

decision was followed by *American Can Co.*,[26] and the doctrine that a settled pattern of bargaining on an industrial basis would not be disturbed in order to allow craft severance was thereafter known under that name.

It should be emphasized that these pronouncements were followed in no doctrinaire fashion; in numerous cases each Board member departed from these asserted criteria.[27] The "evenly balanced considerations" test of the *Globe* case itself allowed a considerable room for maneuver, and it was not difficult to find flaws, where that seemed desirable, in the "history of bargaining on an industrial basis". By the time of *Bethlehem Steel Company*,[28] in 1941, the Board allowed craft severance to pattern makers because they constituted "a well established and highly skilled craft requiring a long apprenticeship."

TAFT-HARTLEY AND THE CRAFT—INDUSTRIAL UNIT PROBLEM

This was the situation at the time of the Taft-Hartley Act.[29] That Act muddied rather than settled the craft-industrial union dispute by providing in Section 9 (b) that the NLRB "shall not . . . decide that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation", leaving open the question whether the Board might not, despite a prior determination, find an industrial unit still appropriate on other grounds. The limited impact of this change on the craft-industrial union controversy was soon apparent in *National Tube Co.*,[30] where the Board refused to sever out a craft of bricklayers in the basic steel industry, thereby substantially reaffirming the rule in the *American Can* case.

With the advent of the Eisenhower Administration in 1953, and the appointment of Chairman Farmer and other new members to the NLRB, it was thought that the craft severance problem should again be investigated. If any generalization can fairly be made concerning administration of this problem during twenty years of the Act, it is that each new Board member devotes his first weeks in office to formulating the craft severance rules which he intends to follow, and the remainder of his term finding reasons for creating exceptions to those rules. The new Board members followed the traditions of their predecessors and scheduled

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[26] 13 N.L.R.B. No. 126, (1939).

[27] Thus, Chairman Madden denied severance in American Hardware Corp. 4 N.L.R.B. 412 because of a doubt whether the group sought to be severed was a true craft; Board Member Smith applied the Globe doctrine in Shell Chemical Co., 4 N.L.R.B. 259; Dr. Leiserson consented to the severance of pattern makers in the face of a history of bargaining on an industrial basis in Maryland Dry Docks Co., 23 N.L.R.B. No. 95. These examples, chosen almost at random, could be multiplied many times over.

[28] 32 N.L.R.B. No. 176 (1941); *see also* Dain Manufacturing Co., 29 N.L.R.B. No. 93 (1941).

[29] Public Law 101, c. 120, 80th Cong. 1st Sess., 1947.

[30] 76 N.L.R.B. 1199 (1948).

elaborate arguments in *American Potash and Chemical Corp.*,[31] where units of electrical and power house employees sought severance from an industrial unit. The majority in denying severance said that they did not "deem it wise or feasible to upset a pattern of bargaining already firmly established" and therefore affirmed the continued vigor of the *National Tube* case. But, they added, they would allow severance where "a true craft group is sought and where, in addition, the union seeking to represent it is one which traditionally represents the craft". The majority said that it proposed "to exercise great care in making certain that . . . only groups exercising genuine craft skills will be embraced within the ambit of the rule". Board Member Peterson, dissenting, thought the new rule would have serious consequences.

> Unions . . . now have an open invitation to invade industries and plants where stable industrial-type bargaining relations have existed for a substantial period. . . . The majority's decision gives positive assurance that a raid will not be turned aside . . . no matter how compelling the evidence. . . .

It would appear that the Board has found these criteria no more completely dispositive of concrete cases than their predecessors did their formulations. In *Chicago Pneumatic Tool Co.*,[32] the Board found that the maintenance electricians sought to be severed did not "exercise the gamut of skills characteristic of the electricians' craft"; in *Mills Industries, Inc.*,[33] over Member Rodgers' dissent, severance was refused to a group of machine repairmen who, the majority found, "may properly be regarded as members of a craft which the Petitioner has traditionally represented"; since then the exceptions to the rules of the *American Potash & Chemical Corp.* case have been approximately as numerous as their applications.[34]

Section 8 (b) (4) (D) And Unit Problems

A new confusion in dealing with the problem of the "appropriate unit" has been introduced by Section 8 (b) (4) (D) of the Taft-Hartley Act, which makes it an unfair labor practice for a union to force or require an employer "to assign particular work to employees in a particular labor organization or in a particular trade, craft or class" rather than to employees in another labor organization or trade, craft or class. The difficulty derives from the semantic problem involved in distinguishing a dispute about "an appropriate unit", from a question of "jurisdiction" or "assignment of work".

The Congress clearly stated that under Taft-Hartley "the primary strike for recognition (without a Board certification) is not proscribed".[35]

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[31] 107 N.L.R.B. No. 290 (1954).

[32] 108 N.L.R.B. No. 36 (1954).

[33] 108 N.L.R.B. No. 49 (1954).

[34] *See,* Krislov *The N.L.R.B. on Craft Severance; One Year of American Potash,* Labor Law Journal. May 1955. CCH

[35] S. Rep. 105, 80th Cong., 1st Sess. 22 (1947).

If a union may strike for recognition, it appears to follow that it may strike for recognition to represent employees in some unit which it deems appropriate, absent a certification of another union. It would appear that this was all that was involved in *Local Union No. 5-265, Woodworkers.*[36] The Union there had contracts with two employers, covering two mills. The Employers jointly erected a third mill, but refused to extend the agreement to the new mill, and refused a Union demand that laid off workers at the two mills be hired at the new operation. It would appear that this was no more than a strike for recognition over a unit deemed proper by the Union. But the Board held it to be a dispute over "assignment of work" and hence unlawful—completely disregarding the fact that wage rates at the new mill were substantially lower than those provided in the union agreement, so that the Union had valid economic objectives as well.

The problem is further confused by a decision such as that in *International Association of Machinists.*[37] In that case there had been a long-standing dispute between the Machinists and the Carpenters, covering millwright work. At a time when there was no millwright work being performed, except by one subcontractor holding an agreement with the Machinists, the Machinists demanded, and struck for, a contract clause providing that millwright work could be subcontracted only to employers under agreement with the Machinists. The Board held that Section 8 (b) (4) (D) had not been violated, on the ground that there was no demand for any present assignment of work, as contemplated by the Act, but merely a contract demand covering the selection of subcontractors. The decision seems entirely correct, and presumably the same result would have followed if the Machinists had demanded a contract clause specifying that the appropriate bargaining unit which they represented should include millwrights, or had demanded a simple clause giving them "jurisdiction" over millwright work. But had the Machinists waited until millwright work was being performed, and then demanded that it be "assigned" to them, their strike would have been unlawful. The decision illustrates that the concepts of "appropriate unit", "jurisdiction" and "assignment of work" are frequently overlapping, and sometimes identical, and that differing legal results will follow depending upon the epithet initially used to describe the dispute. In the field of inter-union disputes, therefore, the Board's willingness to accept, or reject, "assignment of work" cases under Section 8 (b) (4) (D) has an important bearing on problems arising under Section 9.

In a number of cases the Board has followed the salutary principle of declining jurisdiction where voluntary machinery for settlement of

[36] 107 N.L.R.B. No. 237 (1954).

[37] 101 N.L.R.B. 346 (1952).

[38] Manhattan Construction Co., 96 N.L.R.B. 1045 (1951); Teamsters, Local 236, 97 N.L.R.B. 1003; Roy Stone Transfer Corp., 99 N.L.R.B. 662 (1952).

[39] 108 N.L.R.B. No. 50 (1954).

these disputes existed.[38] But there have been disturbing signs of a retreat from this approach. The fact that employers are not parties to such voluntary agreements should certainly be irrelevant, yet it was on this ground that the Board accepted jurisdiction of an inter-union dispute in *York Corp.*[39]

It is now necessary to return to consideration of another issue.

COLLECTIVE AGREEMENTS AS BARS TO ELECTIONS

The Board was early faced with the problem of directing an election in the face of an existing collective agreement. Its initial reaction was to give the fact little weight. In *Black Diamond Steamship Co.*,[40] it directed an election in the face of an existing agreement, and noted that

> "The mere holding of the election will in no way affect the rights and duties, if any, arising out of (the contract)."

Since the agreement there was about to expire, the Board noted that

> "We deem it unnecessary to determine what would otherwise be the effect of the contract on the petition before us."

While in theory the Board thereafter began to recognize an existing contract as a bar, the exceptions to this rule tended to overwhelm the rule itself. In *Superior Electrical Products Co.*,[41] the Board dismissed a petition in the face of an existing agreement which had run for only about six months "without prejudice to renewal at a reasonable time before the expiration of the agreement." But the Board proceeded in the face of existing agreements where the union did not represent a majority when the contract was executed,[42] or where the contracting union had been assisted by the employer,[43] or where the agreement had been entered into after the Board began its investigation,[44] or where the agreement had been renewed after filing of a petition,[45] or where an existing agreement was about to expire,[46] or where a five year agreement had been in existence for more than one year,[47] or where the unit covered by the agreement was inappropriate,[48] or where the contract covered union members only,[49] or in a variety of other circumstances. In *Columbia Broadcasting System*,[50] the Board laid it down as a rule that no contract could be a bar which had already been in effect for one year, in order "to prevent undue restriction on the selection of representatives by employees." Where factional disputes raised doubts concerning

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[40] 2 N.L.R.B. 241 (1936).
[41] 6 N.L.R.B. 19 (1938).
[42] Southern Chemical Cotton Co., 3 N.L.R.B. 869 (1937).
[43] Mine B Coal Co., 4 N.L.R.B. 316 (1937).
[44] American-West Africa Line, 4 N.L.R.B. 1086 (1938).
[45] American France Line, 7 N.L.R.B. 79 (1938).
[46] Atlantic Footwear Co., 5 N.L.R.B. 252 (1938).
[47] Metro-Goldwyn Mayer Studios, 7 N.L.R.B. 662 (1938).
[48] Kinnear Manufacturing Co., 4 N.L.R.B. 773 (1938).
[49] Northrop Corporation, 3 N.L.R.B. 228 (1937).
[50] 8 N.L.R.B. 508 (1938).

the majority during the life of an agreement, the Board was entirely disposed to resolve the issue.[51] Even if it found that an election was barred by an agreement, it frequently directed merely that the case be held in abeyance until shortly before the agreement was to expire.[52]

Gradually, a shift from this liberality made itself felt. In *Eaton Manufacturing Co.*,[53] an agreement was held to be a bar though it was open to the technical objection that it had not been duly ratified by the union membership. In *Hettrick Manufacturing Co.*,[54] it was held that an oral claim of majority prior to renewal of an agreement did not remove the contract as a bar, and the doctrine of that case was given an appreciable extension in *Mill B. Inc.*,[55] where the Board held that a one-year contract, automatically renewed for another year, would be a bar during its second year unless a rival union filed a petition for an election before the parties were required, under the agreement, to give notice of their intention to renegotiate the agreement. Under that case, a contract might therefore bar an election, whatever its actual duration, unless rival unions gave timely notice. By 1941, the Board in *Owens-Illinois Pacific Coast Co.*,[56] recognized two-year agreements which were "typical of the industry" as bars during their lives. This gradually evolved into a rule of "reasonable duration"[57] and by 1946, the Board was prepared to find that a three year agreement was a bar where it was shown that such agreements were customary in the industry and locality.[58] Rather surprisingly, the Board during the World World II treated agreements terminable "upon cessation of hostilities" or for the "duration of the national emergency" as contracts for an indefinite period and therefore not bars to elections;[59] the necessity for stabilized labor relations during that period might well have dictated another result.

The Board since the World War II has continued the policy of granting increased respect to existing agreements. In *Kimberley Clark Corp.*,[60] the Board tied together the one-year certification rule and its contract bar rules, with the result that a new election would not be held during the life of an agreement concluded during the one-year period following a prior election. In *General Electric X-Ray Co.*,[61] rival unions were required to file a petition for an election within ten days after giving notice of a claim of majority in order to prevent an automatically

[51] Brewster Aeronautical Corp. 14 N.L.R.B. 1024 (1939).

[52] Oppenheimer Casing Co., 13 N.L.R.B. 300 (1939).

[53] 29 N.L.R.B. No. 12 (1941).

[54] 25 N.L.R.B. No. 79 (1940).

[55] 40 N.L.R.B. No. 346 (1942).

[56] 36 N.L.R.B. 990 (1941).

[57] United States Finishing Co., 63 N.L.R.B. 575 (1945).

[58] Oman, Incorporated, 69 N.L.R.B. No. 135 (1946).

[59] Heinsheimer Bros., 69 N.L.R.B. No. 28 (1946); Cotton Trade Warehouses, 68 N.L.R.B. No. 7 (1946); International Harvester Co., 61 N.L.R.B. 133 (1945).

[60] 61 N.L.R.B. 90 (1945).

[61] 67 N.L.R.B. 997 (1946).

renewed contract from being held a bar. In *Reed Roller Bit Co.*,[62] the Board explicitly noted its changing policy, stating that in the experimental and transitional period which followed adoption of the Wagner Act:

> It was especially necessary, therefore, to lay emphasis upon the right of workers to select and change their representatives. Now, however, this emphasis can be better placed elsewhere. We think the time has come when stability of industrial relations can be better served.

by recognizing in all cases that two-year agreements, irrespective of the custom of the industry, should bar new elections.[63]

THE EFFECT OF TAFT-HARTLEY ON CONTRACT BARS

In 1950, the United Automobile Workers obtained a five-year agreement with the major automobile companies. Consistent with earlier trends, the NLRB recognized these agreements as bars to elections for their duration.[64]

The Taft-Hartley Act was silent on the subject of contracts as bars; by necessary implication, the Congress therefore adopted the general position of the NLRB. Despite this, the Act has had important repercussions, in that it has furnished the NLRB with additional reasons for holding agreements not to bar elections. The Board has insisted, to the point of absurdity, that contracts literally comply, in all their provisions, with the Act, in order to act as a bar. For example, agreements requiring employees to pay "special dues" (as well as regular monthly dues)[65] or assessments[66] or containing an unauthorized union security clause,[67] have been held to be "illegal" and therefore not bars to new elections. The Board here has indicated a willingness to unsettle a bargaining relationship because the parties have been ill-advised, or merely wrong, in estimating the statutory requirements. In adopting the Taft-

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[62] 72 N.L.R.B. 927 (1947).

[63] It is to be noted that the N.L.R.B. while granting an increased measure of protection to existing agreements, was at the same time developing a labor law rule against perpetuities. In Rutland Court Owners, Inc. 44 N.L.R.B. 587 (1942) it held that the discharge of workers for dual unionism under a closed shop agreement, near the end of the contract term when a petition for a new election would have been timely, was discriminatory. The status of this line of cases was cloudy (see Colgate-Palmolive-Peet v. NLRB, 338 U.S. 355 (1949)) and has in any event been made irrelevant by Sections 8(a) (3) and 8(b) (2) of the Taft-Hartley Act which (unwisely, in my view) forbid discharges for dual union activity at any time. In Wichita Union Stockyards, 40 N.L.R.B. 369 (1942), the NLRB announced its "premature extension" rule; i.e., that a new agreement made prior to the automatic renewal date of an existing contract would not bar a petition otherwise timely filed. The obvious purpose of both rules was to deny an incumbent union perpetual tenure through use of these devices.

[64] Bendix Aviation Corp.

[65] Federal Telephone and Radio Corp. 98 N.L.R.B. 1324 (1952).

[66] International Harvester Co., 95 N.L.R.B. 730 (1951).

[67] Aluminum Company of America, 96 N.L.R.B. 781 (1951).

Hartley Act the Congress demonstrated, somewhat emphatically, that the NLRB was not to assume the task of policing agreements, or union rules. Section 8 (b) (1) shows an explicit intention that the NLRB is not to enter the latter field. Section 301, by granting the Federal Courts a wider jurisdiction over suits for contract violations, showed that the Congress wished to follow the traditional rule that the courts, not the NLRB, should interpret and enforce agreements. In adopting the Act, the Congress expressly declined to accept an amendment which would have made a violation of an agreement an unfair labor practice, on the expressed ground that these matters should be left to the courts.[68] The action of the Supreme Court in appearing to hold that the NLRB in these cases is acting within its powers[69] is not, of course, conclusive of the merit of these decisions.

In two decades, therefore, the Board has moved from a position which, in general, made every union vulnerable to a new election at least yearly, to a position where the incumbency of a functioning union could be prolonged beyond five years. These changes, reflecting the increased maturity of the labor movement and of collective bargaining relationships, seem wise responses. Without unduly hampering freedom of choice, they give the parties assurance of a settled relationship, discourage raiding, and permit orderly administration of agreements. Too often the NLRB has made it appear that it sought to protect the "sanctity of contracts" rather than a settled bargaining relationship; a policy akin to that of a domestic relations court which strove to preserve marriage licenses rather than marriages. But, on the whole, the current of decision has followed industrial developments.

Other Limitations on Direction of Elections

In the first years of the Board's work, a number of other doctrines began to develop which limited access to the Board's election machinery. The Act was silent on the matter, but it was entirely clear that if a certification were to have any meaning its validity for some period of time had to be recognized. The Board early began the formulation of the rule that certifications, in the absence of unusual circumstances, would bar another election for a period of one year.[70] Initially the problem was treated, not as a question of the validity of a certification, but of the effect of a prior election.[71] The Board gave no effect to such a prior election where it had been conducted by an employer[72] or where a com-

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[68] H. R. Rep. No. 510, 80th Cong., 1st Sess. (1947) explained the deletion of such provisions on the ground that "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of law and not to the National Labor Relations Board."

[69] Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

[70] National Sugar Refining Company, 4 N.L.R.B. 276 (1937).

[71] see 4 N.L.R.B. Ann. Rep. 138 (1938).

[72] Heller Bros. Co., 7 N.L.R.B. 636 (1938).

pany dominated union appeared on the ballot[73], or where the employer had interfered in the election[74] or where electioneering was prohibited.[75] If no certification resulted, the Board directed another election[76] and it would consider petitions during the life of a certification if it was apparent that the election results could not be tallied until the certification was over a year old.[77] By the time its fifth annual report was issued, the Board was able to state that it had generally refused to proceed with an investigation less than a year after a prior determination and certification of representatives.[78]

The "one year certification" rule has remained substantially unchanged since its adoption. The Taft-Hartley Act made no change in this rule, but gave it a new importance by providing in Sections 8 (b) (4) (B) and (C) that strikes and boycotts against Board certifications were unfair labor practices; in failing to state during what period a certification remains effective, it has raised new and difficult problems.[79]

It was early evident that the holding of an election was futile if the petitioning labor organization had no substantial representation among the employees. In *Williams Dimond*[80] the Board early dismissed a petition where it appeared that only five of about seventy employees involved had joined the union. Subsequently, this was evolved into a rule of "substantial adherence", which depended upon the facts in each case.[81] Still later, by administrative rule, this crystallized into a rule that before the Board would direct an election a petitioning union should show adherence of thirty per cent of the eligible voters, except in cases where a closed-shop agreement was in effect.

Certain other matters merit brief mention. The Board early adopted an "extent of organization" rule.[82] That rule recognized as appropriate a unit smaller than the Board would normally approve, depending upon the extent to which unions had organized the employees on the ground that "it is obviously desirable that, in the determination of the appropriate unit, we render collective bargaining of the company's employees an immediate possibility". The rule was of substantial utility in aiding unions to organize far-flung groups of employees. The Taft-Hartley Act

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[73] S. Bechman and Sons, Inc., 4 N.L.R.B. 15 (1937).

[74] United Carbon Co., 7 N.L.R.B. 598 (1938).

[75] Minneapolis-Moline Power Implement Co., 7 N.L.R.B. 840 (1938).

[76] Pacific Greyhound Lines, 9 N.L.R.B. 557 (1938).

[77] Waterman Steamship Co., 10 N.L.R.B. 1079 (1939).

[78] 7 N.L.R.B. Ann. Rep. 55 (1940).

[79] See United Mine Workers, 106 N.L.R.B. No. 153 (1953).

[80] 1 N.L.R.B. 371 (1936).

[81] Thus, in Nevada California Corporation, 20 N.L.R.B. No. 2 (1940) the Board required only a small showing because of the employer's "avowed opposition" to the Union. In Ward Baking Co., 21 N.L.R.B. No. 44 (1940) only a small showing was required in the face of a closed shop agreement.

[82] Gulf Oil Corporation, 4 N.L.R.B. 133 (1937).

muddied the problem by providing, in Section 9 (c) (5) that "the extent to which employees have organized shall not be controlling", leaving open the question whether it might be considered. In practice, the Board has abandoned the doctrine which had largely served its purpose in any event.

Another vexing problem was that of multiple-employer units. In 1939 it was held that the Board had power to find a multiple employer unit appropriate.[83] In *Shipowners Association of the Pacific Coast*,[84] the Board found proper a unit of the employees of all West Coast waterfront longshore employers, the consequence of which would have been to exclude AF of L unions from longshoring work at certain ports. Though later reversed[85] the initial decision did much to widen the breach between the Board and the American Federation of Labor. The hearings on amendments to the Act in 1939 publicized the breach, and though no legislation resulted, they marked the beginning of a determined Congressional drive for amendments which culminated in the Taft-Hartley Act of 1947.

The years of World War II brought some new problems. The first was the "expanding unit" problem, brought about by the mushrooming of large enterprises under the impact of war conditions. The Board responded by holding that a new election would be held within less than one year if fifty per cent of the total complement of employees had not been hired at the time of the first election, and by not treating as bars contracts in cases where the work force had more than doubled, or where the plant had been transferred to another city.[86] "Reconversion" after the War brought some new problems, principally dealing with "contracting" rather than "expanding" units, which did not, however, require sharp changes in Board policies.

Conclusions

From this brief review, certain conclusions may appropriately be drawn. The statutory objectives of "freedom of association", "effective collective bargaining" and "stabilization" of industrial relations are not identical, and each Board member has been faced with a choice of emphasis among them. "Rules" are perhaps useful, but in a field depending ultimately on a nice judgment, they represent more a formulation of the individual Board members' views than criteria which can be predictably applied. Parties before the NLRB will stress such of these considerations as happen to support their position, largely depending upon whether they seek to change or maintain an established position.

The problem is not essentially different from that which faces a

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[83] NLRB v. Lunc, 103 F. 2d 815 (8th Cir. 1939).

[84] 7 N.L.R.B. 1002 (1938).

[85] Shipowners Association of the Pacific Coast, 32 N.L.R.B. 124 (1941).

[86] Chase Brass and Copper, Inc., 47 N.L.R.B. 298 (1943); Sardik Food Corp., 46 N.L.R.B. 894 (1942); Aluminum Company of America, 49 N.L.R.B. 1431 (1943), 51 N.L.R.B. 1295 (1943), 52 N.L.R.B. 1040 (1943).

legislature in redistricting a state; it involves the finding of a practical political solution rather than the making of a moral judgment. Employees do not have a "right" to be in one unit rather than another, more than the citizen has a "right" to be in a particular Congressional district. In consequence, the Board, the courts, the Congress, labor and management have been equally unsuccessful in finding an acceptable formula, applicable to all, or even most, disputed cases.

It is apparent that there are important considerations to be weighed against individual or group freedom of choice. Collective bargaining and trade unionism constitute a form of industrial government; like other forms of government, this implies the ability to exercise some degree of coercion. "Majority rule", which is written into the statute and which no one proposes to change, is the clearest example. Every form of representative government must necessarily curtail freedom of choice for a period after a choice has been made, if the representatives are to have any opportunity to discharge the functions for which they have been selected. An essential statutory objective is the stability of the collective agreement, which must be respected. There is an alternative, not present in the political field, in the opportunity normally afforded union members to change their representatives within the union itself.

There are economic factors, thus far given little or no weight by the Congress or the NLRB, which may also call for some limitations. The freedom of a group of dissidents to hold themselves aloof, and to undercut the carefully erected structure of wage rates in an industry, does not appear so sacred that it should be protected against all coercion, whether through pressures on the employer or otherwise. Accommodations between unions may make it highly desirable to transfer "jurisdiction" over a group of employees; the interest of industrial order is not to be entirely neglected because this may involve some loss of freedom of choice. In short, if industrial government is not to become industrial anarchy, the needs of that government must be consulted as well as those of the governed.

Lest these observations be misunderstood, it is clear that freedom of choice must remain an important objective. Only a police state could fix, once and for all, the union affiliations of workers, and the opportunity for orderly and deliberate change is in itself a condition of industrial stability. Rivalry and competition within the labor movement has its proper place, and the changing industrial scene will continually call for new patterns and accommodations. My only purpose has been to stress, what is perhaps obvious, that "freedom of choice" cannot be the touchstone to the solution of vexed problems.

A challenging opportunity now faces the Board, management and labor. The last several months have seen the conclusion of an impressive number of no-raiding agreements between unions, which mark jurisdictional boundaries and provide voluntary machinery for settling disputes

that arise. There have been a number of mergers of unions in the same fields, which should operate to diminish somewhat the area of inter-union conflict. The projected merger of the AF of L and the CIO should give additional impetus to these developments. A chief goal of all parties should be the encouragement of these trends.

Manifestly, if the NLRB assumes jurisdiction of such inter-union disputes, in cases where unions have made arrangements for their adjudication, unions have little incentive to establish appropriate machinery, or having established it, to abide by it. The opportunity for a second bite at the apple, before a governmental tribunal with enforcement powers, offers the losing party strong incentives and undermines completely the authority of the voluntary machinery. The Board will not extricate itself from the field of inter-union disputes, as I believe it should, unless it accords the utmost deference to such voluntary mechanisms.

No one has suggested that the jurisdictional disputes machinery provided by Section 8 (b) (4) (D) of Taft-Hartley has worked well, if indeed it has worked at all. The normal result has been to impress the Board's seal of approval on the employer's assignment of work, usually well after the fact, and often after the damage has been done. Employers may welcome this governmental approval of their actions, but its practical utility is open to question. The semantic difficulties of distinguishing between a dispute about an "appropriate unit", or "jurisdiction", or "assignment of work" are well-nigh insoluble, and it appears that differing legal consequences depend solely on the name originally applied to the disagreement.

Employers have much to gain—in speed and finality of resolution of such disputes, by whatever name called—through settlements achieved by voluntary trade union machinery, rather than the Government. The trade union movement has traditionally opposed, and continues to oppose, decision of these matters by the Government, for the sufficient reason that the power to shape the future structure of the trade union movement should be determined by its members, and not by outside agencies or decisions imposed by law. The effort of the NLRB to decide these issues, more than any other single factor, has prejudiced its work and its prestige. The decisions in *Globe, American Can, National Tube* and *American Potash* have, each in their turn, been followed by outcries from labor leaders or employers who thought themselves thereby injured. In the relatively stable climate of labor relations which we now enjoy, the NLRB has the opportunity to doff its hair shirt.

Attainment of this ideal will require a major effort. Labor must address itself more zealously than ever to erecting effective voluntary machinery, and providing adequate sanctions. Since unions do not have autocratic powers over their members, it would be naive to suppose that success will always be attained. Employers, therefore, must be prepared

to exercise a certain forebearance when the inevitable frictions arise. The NLRB can do much to encourage these trends by consciously reviving and strengthening the doctrines of the *Axton-Fisher* and *Manhattan Construction* cases, maintaining as far as possible a hands-off attitude in inter-union conflicts where appropriate voluntary machinery is available. The frequent observation that this means a return to the "law of the jungle" seems singularly unappealing; it implies that any decision of the Government to leave problems to the unsupervised determination of responsible citizens is wrong, because it is disorderly. The objective is to assign these matters for decision to tribunals voluntarily established—the antithesis of the "law of the jungle".

This is not the place to examine the manifold advantages of a system of free labor—which means, precisely, freedom from Government control. If the mid-30s called for a degree of governmental intervention unknown to that point, the need has largely dissipated. The present members of the NLRB have shown a commendable tendency in various ways to diminish the degree to which the Government will assume responsibility for these decisions, though working in opposite directions on occasion. I believe that they can now make their greatest contribution by the adoption of policies which respect orderly and settled collective bargaining relationships, the use of voluntary machinery for the settlement of inter-union conflicts, and the right of parties to make such agreements as they choose with a minimum of governmental supervision.